No. 2501.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation, organized and existing under the laws of the State of Arizona,

Appellant,

vs.

L. D. STEPHENS and YOLO WATER AND POWER COMPANY, a Corporation, organized and existing under the laws of the State of California,

Appellees.

BRIEF OF APPELLANT.

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F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

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STATEMENT OF FACTS.

This is an appeal from a decree dismissing appellant's bill for want of jurisdiction.

Appellant is a citizen of Arizona. The appellees are both citizens of California. The court below was

of opinion that the suit was brought by appellant as an assignee to recover on a *chose in action,* and that since the assignor, a citizen of California, could not have maintained the suit, neither could the appellant (Tr., pp. 26-27).

The facts in this case are somewhat different from the facts involved in Appeals Nos. 2500 and 2502, in that there mortgages by deed absolute were involved while here we have a resulting trust as well.

On October 10, 1906, Mary B. Collier and her husband agreed to sell certain lands to one Shuman (Tr., p. 2).

On May 7, 1907, Shuman assigned the contract to California Industrial Company (Tr., p. 7).

On the same day said Mary B. Collier and her husband entered into an agreement with said California Industrial Company which was supplemental to the said agreement of October 10, 1906 (Tr., p. 7).

Both of the foregoing agreements were thereafter assigned to Central Counties Land Company (Tr., p. 13).

Said Central Counties Land Company and its predecessors performed all of the covenants contained in said agreements until it came time for the final payment. They had paid $15,500 principal and $1250 interest. Seven thousand dollars remained to be paid (Tr., pp. 13-14).

Said Central Counties Land Company applied to appellee Stephens for the loan of $7000.00 with which

to make the last payment. He consented. The said contracts with the Colliers were assigned to him. He paid to the Colliers the money and took a deed direct from them (Tr., p. 16), it having been previously arranged that when this was done he should hold the title as security (Tr., p. 15).

The Central Counties Land Company had entered into possession under the Collier agreements and its tenant was in possession at the time of the deed from the Colliers to said Stephens, and after the deed was made said Central Counties Land Company continued in possession by their tenant. Their tenant did not attorn to said Stephens (Tr., p. 16).

This continued until November 1st, 1911. Meanwhile divers sums were paid by said Central Counties Land Company to Stephens on account of the principal and interest of the loan. Since November 1st, 1911, the appellees have collected the rents (Tr., p. 16).

On that date Stephens was indebted to the Central Counties Land Company in an amount in excess of the loan (Tr., p. 17; see also p. 18).

Stephens has executed an instrument purporting to convey the said lands to appellee Yolo Water and Power Company. The latter had full knowledge of all of the facts (Tr., p. 19).

The prayer is for a decree that plaintiff is the owner of the property and is entitled to be let into possession

upon paying to Stephens or his assigns anything ascertained to be due, and for general relief.

That the learned judge of the court below erred in holding the action to be one to "recover upon a chose in action" is, we think, clear beyond all question.

THE ACTION WAS TO ESTABLISH A RESULTING TRUST—NOT TO RECOVER UPON A CHOSE IN ACTION.

A. That this is true will be clear from the following quotations:

> "When the defendant loaned the money to plaintiff, Cordelia, it became hers, and its payment to the owners of the lot was a payment of her own money as much so as if she had the money without borrowing it. It seems to us quite clear that defendant held the title as trustee and also, in a sense, as mortgagee, and that upon payment of the loan plaintiffs were entitled to a reconveyance to them of the title by defendant.
>
> "Section 853 of the Civil Code provides: 'When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.' . . . The Court found that the consideration was paid by and for the plaintiffs, and, although the deed was made to defendant in part as security, a trust nevertheless resulted 'in favor of the person by or for whom such payment is made.' And such a trust—by operation of law—may be created. (Civil Code, Sec. 853.) . . . This (case) is essentially the enforcement of a resulting trust, and the statute of limitations invoked by defendant has no application."

Whitehouse v. *Whitehouse,* 22 Cal. App., 565, 567-8.

> "The rule is familiar that when, upon a purchase of real property, the purchase-money is paid by one person and the

conveyance is made to another, a resulting trust immediately arises against the person to whom the land is conveyed, in favor of the one by whom the purchase-money is paid. The real purchaser of the property is considered as the owner, with the right to control the title in the hands of the grantee and to demand a conveyance from him at any time. The same rule prevails if the money paid by the party taking the title is advanced by him as a loan to the other, and the conveyance is made to the lender for the purpose of securing the loan. But in the latter case the purchaser cannot demand the conveyance until he has paid the money advanced, and for which the land is held as security. In such a case the grantee holds a double relation to the real purchaser; he is his trustee of the legal title to the land and is mortgagee for the money advanced for its purchase, and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security."

Campbell v. *Freeman,* 99 Cal., 546, 547-8.

See to like effect:

Thomas v. *Jameson,* 77 Cal., 91, 93;
Hellman v. *Messmer,* 75 Cal., 166, 170;
Walton v. *Karnes,* 67 Cal., 255.

The trust arises in this case by operation of law. The parties agreed according to the bill to do the very things that the law would in the absence of such agreement have required of them. This does not alter the legal effect of the transaction or convert the suit into an action to specifically enforce the agreement. The following quotations make this clear:

"But the appellant contends that there being a special agreement between the parties, this constitutes an *express* trust, as contradistinguished from the *implied or resulting* trust, which arises by implication from the payment of the consideration money; . . . There was no agreement, in

terms, that the defendant should hold the property in trust for the plaintiffs, which would seem to be necessary to create an *express* trust; but from the facts that the purchase was made with the money of the plaintiffs, and the conveyance made to the defendant, the law implies that the title thus conveyed is held in trust for the person furnishing the money, and thus the trust is created by operation of law. *The fact that the defendant agreed by parol to do what the law would compel him to do—that is, hold the title subject to the rights of the plaintiffs, and convey to them upon demand after a certain time, makes the trust none the less a trust created by operation of law.*"

Bayles v. *Baxter,* 22 Cal., 575, 578-9.

"The fact that the parties agreed verbally to do that which the law implies from their acts did not in any wise affect the character of the transaction as a trust created by operation of law."

Gerety v. *O'Sheehan,* 9 Cal. App., 447, 450.

"The averment of exactly the verbal agreement which, in the absence of any contract the law would imply, would not alter the nature of the action. (*Bayles* v. *Baxter,* 22 Cal., 578; *Gerety* v. *O'Sheehan,* 9 Cal. App., 447; 99 Pac., 546; *Faylor* v. *Faylor,* 136 Cal., 93; 68 Pac., 482.)"

Breitenbucher v. *Oppenheim,* 160 Cal., 98, 102.

We have, then, a suit to establish a resulting trust, and to compel the trustee to convey upon receiving the amount of the purchase price advanced by him.

B. That such a suit is not to recover upon a chose in action, and that a suit by the grantee of the holder of the equitable title is not a suit by an *assignee* to recover upon a chose in action is clear beyond question.

There are not many cases in the books that say this

in express terms, to be sure. It seems likely that it seldom has happened that the full equitable title of the beneficiary under a resulting trust has been supposed to be a chose in action. However, such a case did arise in this Circuit, and the Court said:

> "It is now objected that the plaintiff is simply the assignee of a contract or contracts for the title to, or interest in, real property; and, as it does not appear that all the assignors could have maintained this suit on the ground of their citizenship, he cannot do so. . . .
>
> ". . . the bill alleges that since May 4, 1874, the plaintiff Gest, 'by a regular chain of conveyances and assignments,' has acquired 'all the right, title, and interest' which Rice and Clark, Layton & Co. then had in said property, or the rents, issues, and profits thereof. This being so, he is the owner of the property in equity, subject to the lease made to Carter and Packwood. The legal title was wrongfully obtained by the latter after their sale to Rice, and they hold the same in trust for their vendee. A sale and conveyance of the property to Gest under such circumstances, or of all the right, title, and interest of Rice and Clark, Layton & Co. therein, *is the sale and conveyance of the beneficial interest in the property,* and not the mere assignment of a right of action thereabout."

Gest v. *Packwood,* 39 Fed., 525, 537.

Such grantee holds a title—an estate in the land. The holder of the legal title is injuring him—the true owner, every day by withholding from him the legal title. It is not an injury to the grantor. The grantor did not assign an action for this injury. It is a direct injury to the title that is complained of. Analogous cases are numerous enough.

A deed to real property has never been consid-

ered to be a chose in action within the meaning of any of the various judiciary acts of the United States.

In *Briggs* v. *French,* 4 Fed. Cas., 119, it is said:

> "Now, the exception extends to promissory notes and choses in action. The present suit is not founded upon either. *It is founded upon a conveyance of a title to land,* good (as far as appears) by the *lex loci situs* . . . The words, then, of the exception do not apply to the case. It is a case within the general descriptive words as to suitors, founding the jurisdiction of the circuit court."

Similarly, it was said in *Sheldon* v. *Sill,* 8 How., 449, 450:

> "The only remaining inquiry is, whether the complainant in this case is the assignee of a 'chose in action' within the meaning of the statute. . . . The term 'chose in action' is one of comprehensive import. . . . It is true, *a deed of title for land does not come within this description.*"

In Ohio the law was that the title passed under a mortgage, and it was said, after holding the mortgage to be a conveyance of the title:

> "A conveyance of land is not a chose in action . . . That the statute acts upon negotiable paper is clear. . . . *That it does not act on conveyances of real estate, either equitably or legally, would seem to be undoubted.*"

Dundas v. *Bowler,* 8 Fed. Cas., 28, 29.

A like decision is *Smith* v. *Kernochen,* 7 How., 216:

> "The conveyance by the marshal under the receivership proceedings . . . can hardly be considered merely as an assignment of the original contract under which the

> plant was erected. *It was a conveyance of real estate.* . . . There does not seem to be any likeness in the case to that of the assignee of a promissory note or other chose in action."
>
> *Portage City Water Co.* v. *City of Portage,* 102 Fed., 769, 774.

The foregoing considerations establish our contention that appellant is not the assignee of a chose in action, and that the bill is not brought to recover upon a chose in action. It follows that since the requisite diversity of citizenship appears, the District Court has jurisdiction and the decree dismissing the bill must be reversed.

A SECOND GROUND FOR REVERSAL.

It is to be noted before closing, that there is also another ground for upholding the jurisdiction, viz:

The transaction pleaded not only created a resulting trust, but it converted the deed also into a mortgage. (So held in *Campbell* v. *Freeman,* 99 Cal., 548, and many other cases.) As was held in said Campbell case at p. 348, the result is the same whether the conveyance is made by a vendor direct to the person who loans the money with which the vendee makes the purchase or makes it to the vendee, who in turn deeds to the lender of the money to secure the loan.

This being the law, the case is brought directly into line with the issue involved in two appeals now

before this Honorable Court, numbered respectively 2500 and 2502; for in said two cases, mortgages by deeds absolute are involved. What is said in the briefs filed by this appellant in said appeals is therefore pertinent to this case also, and we respectfully refer to said briefs and beg leave to make the discussion of the jurisdictional questions therein contained a part hereof. From the authorities cited in said discussion, as well as from what is set forth hereinabove, we respectfully submit that the jurisdiction of the District Court to entertain this cause is perfectly clear.

Respectfully submitted.

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